Supreme Court, U.S.
FILED
FEB 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

(6)

NO. 88-1019

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

HERBERT D. BERKSON,
PETITIONER

V.

DEL MONTE CORPORATION, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT PRICE WATERHOUSE

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QUESTION PRESENTED FOR REVIEW

Whether petitioner Herbert D. Berkson's petition for a writ of certiorari should be denied and whether the unanimous decisions of the courts below that collateral estoppel and the statute of limitations bar petitioner's suit against respondent Price Waterhouse should thus stand.

STATEMENT OF THE CASE

Respondent Price Waterhouse submits this brief in opposition to petitioner Herbert D. Berkson's petition for a writ of certiorari to the United States Court of Appeals for the First Circuit. The 13-year procedural history of this litigation is fully and accurately set forth in the brief submitted by respondent

United Brands Company, and Price Waterhouse adopts that brief by reference in its entirety and joins in all the arguments set forth therein.

REASONS FOR DENYING THE WRIT

This case is not an appropriate one for this Court to exercise its discretion to grant certiorari. The petitioner's claims against Price Waterhouse were correctly dismissed on grounds of collateral estoppel and the statute of limitations by the courts below, and neither of the petitioner's two arguments supports the granting of certiorari as to Price Waterhouse.

I. BECAUSE PETITIONER'S ARGUMENT RAISES FOR THE FIRST TIME ALLEGED VIOLATIONS OF THE ANTI-DEFICIENCY ACT, CERTIORARI IS NOT PROPER.

The Petitioner raises for the first time in his Petition for Certiorari wholly new allegations of violations of the Anti-Deficiency Act. The Supreme Court, in Belcher v. Stengel, 429 U.S. 118 (1976), has held that certiorari is improper where a question is raised in a certiorari petition for the first time, such question not having been presented by the record. Certiorari is thus not available to petitioner Berkson in the case at bar: his claims as to Anti-Deficiency Act violations have never before been raised.

II. PETITIONER'S ARGUMENT CONCERNING THE TIMELINESS OF HIS RICO ACTION IS NOT MATERIAL TO PETITIONER'S CLAIMS AGAINST PRICE WATERHOUSE, AS THERE IS NO RICO CLAIM AGAINST PRICE WATERHOUSE.

Although the petitioner referred to the Racketeering Influenced and Corrupt Organizations Act ("RICO") in his complaint in this action, he did not attempt to make a RICO claim against Price Waterhouse. (A.I. at 12-13).[1]

Thus, the petitioner's argument for

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[1] [Citations to the two-volume Appendix shall be in the form "A.I. at 12-13" with the roman numeral designating the volume within which the material appears, and the arabic numbers designating the pertinent pages within that volume.]

certiorari based on an alleged error by the First Circuit in construing the RICO statute of limitations is not material to the petitioner's claims against Price Waterhouse.[2]

CONCLUSION

Both the District Court and the United States Court of Appeals for the First Circuit dismissed the petitioner's claims on grounds of collateral estoppel and the statute of limitations. The petitioner has raised two

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[2] Even if the petitioner had advanced a RICO claim against Price Waterhouse, such a claim would be time-barred, as was decided unanimously by the courts below. Despite the petitioner's allegations in his petition for certiorari that he brought his RICO action within the statute of limitations period, both the District Court and the First Circuit Court of Appeals found that the petitioner's RICO claims were not brought within such time, and that the petitioner was not entitled to another opportunity to litigate the issue.

arguments to support his petition for certiorari: one is wholly inapplicable as it concerns the statute of limitations on a claim not raised against Price Waterhouse, and the other is not proper grounds for certiorari, because the question raised is a wholly new one, not presented by the record.

For these reasons, this is not an appropriate case for the exercise of certiorari. The petition should be denied.

Respectfully submitted,

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Dated: February 6, 1989

CERTIFICATE OF SERVICE

I, Jeffrey B. Rudman, hereby certify that on the 6th day of February, 1989, I served three (3) copies of the within and foregoing Brief in Opposition of Respondent Price Waterhouse upon Herbert D. Berkson, 294 Washington Street, Suite 427, Boston, MA 02108 by first class mail, with postage prepaid thereon.

Jeffrey B. Rudman